No. 12068

IN THE

United States
Court of Appeals
For the Ninth Circuit

FRANK M. SIEGMUND,

Appellant,

vs.

GENERAL COMMODITIES CORPORATION, LIMITED, WM. H. HEEN, ERNEST K. KAI and THELMA M. AKANA,

Appellees.

Appeal from the District Court of the United States for the District of Arizona (Ling, J.)

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

This is an appeal from an order (R. 68) of the United States District Court for the District of Arizona (Ling, J.) dismissing a complaint (R. 2) brought by the appellant as to the defendants, General Commodities Corporation, Limited, Wm. H. Heen, Ernest K. Kai and Thelma M. Akana for a sum exceeding $3000, for want of jurisdiction by reason of the findings of the court that the Act of Congress passed in 1940, 28 U. S. C. A. 41, amending Section 24, Sub-section 1, of the Judicial Code, is unconstitutional. From that order this appeal has been taken.

The appellant is a citizen of the State of Arizona and sued in the United States District Court for the District of Arizona, jurisdiction being based on diversity of citizenship. The appellees are all citizens of the Territory of Hawaii.

STATUTE INVOLVED

Section 41 (1) of Title 28 United States Code provides as follows:

"41. (Judicial Code, Section 24) Original Jurisdiction

The district courts shall have original jurisdiction as follows:

(1) United States as plaintiff; civil suits at common law or in equity.

First. Of all suits of a civil nature . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 and . . .

(b) Is between citizens of different States *or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory. . . .*" (Italicized part added by amendment of April 20, 1940.)

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8:

The Congress shall have the power:

Sub-Section 9. "To constitute tribunals inferior to the Supreme Court.

Sub-Section 18. To make all laws which shall be necessary and proper for carrying into execu-

tion the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

Article III, Section 1:

"The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

Article III, Section 2:

Sub-section 1. "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

Article IV, Section 3:

Sub-section 2. "The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property

belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."

QUESTIONS INVOLVED

1. Can a suit be maintained by a citizen of the State of Arizona in the District Court of the United States for the District of Arizona against citizens of the Territory of Hawaii where jurisdiction is based on diversity of citizenship?

2. Is the Act of Congress of April 20, 1940, 28 U. S. C. A. 41, amending Section 24, Sub-division 1 of the Judicial Code, expressly allowing citizens of a state to maintain suits in the District Courts of the United States against citizens of the Territory of Hawaii, constitutional?

SUMMARY OF ARGUMENT

The constitutionality of the April 20, 1940, amendment to Section 41 (1) of Title 28 United States Code, upon which jurisdiction is founded in this action, has never been ruled upon by the United States Supreme Court, although the precise question here involved was heard by that Court in the October, 1948, term and is, at this writing, under advisement.

The United States Supreme Court has never construed Article III, Section 2 of the Constitution of the United States to exclude from the Federal Courts actions between a citizen of a state and a citizen of a territory, and that section of the Constitution cannot be reasonably so construed.

In interpreting the true meaning of the Constitution the courts will look to contemporary history for

a determination of the intention of the framers of the Constitution, considering the mischief which the framers intended to prevent and the nature of the remedy which they employed to that end. In the case of the diversity of citizenship provisions of Article III, Section 2, contemporary history and writings reveal the purpose of the Section to have been a guarantee that the citizens of the United States, in actions against a citizen of another jurisdiction in the United States, would not be required to resort to local tribunals which might be influenced by local considerations, favoritism and prejudice, but would always have open to them a Federal Court free from such influence. At the time the Section was enacted Hawaii was not in existence as a Territory of the United States and the foregoing considerations and purposes apply as strongly to actions between citizens of a state and of a territory as to actions between citizens of different states. Thus the word "states" as contained in the Section should not be construed to exclude territories.

The power of Congress to enact the 1940 amendment to the diversity statute is not confined to Article III, Section 2, but may be found elsewhere in the Constitution.

ARGUMENT

I.

THE UNITED STATES SUPREME COURT HAS NEVER CONSTRUED ARTICLE III, SECTION 2 OF THE CONSTITUTION TO EXCLUDE FROM THE FEDERAL COURTS ACTIONS BETWEEN A CITIZEN OF A STATE AND A CITIZEN OF A TERRITORY.

The amendment of April 20, 1940, to the diversity of citizenship statute (Judicial Code, Section 24 (1), 28 U. S. C. A., Section 41, Subd. (1) has been construed a number of times by the courts with conflicting determinations as to its constitutionality.

The amendment has been held constitutional in *Winkler v. Daniels,* 43 F. Supp. 265 (E. D. Va.); *Glaeser v. Acacia Mutual Life Association,* 55 F. Supp. 925 (N. D. Calif.); and *Duze v. Woolley,* 72 F. Supp. 422 (D. Hawaii).

The 1940 amendment has been held unconstitutional in *Central States Cooperatives v. Watson Bros. Transportation Co.,* 165 F. 2d 392 (CCA 7), and *National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co., Inc. of Virginia,* 165 F. 2d, 531, (CCA 4), and in a number of district court cases; *Behlert v. James Foundation of N. Y.,* 60 F. Supp. 706 (S. D., N. Y.), *McGarry v. City of Bethlehem,* 45 F. Supp. 385 (E. D., Pa.), *Ostrow v. Samuel Brilliant Co.,* 66 F. Supp. 593 (D. C. Mass.) and *Wilson v. Guggenheim,* 70 F. Supp. 417 (E. D. S. Car.).

The two Circuit Court of Appeals decisions cited above, *Central State Cooperatives v. Watson Bros. Transportation Co.,* and *National Mutual Insurance Co. v. Tidewater Transfer Co.,* each contain strong dissenting opinions with authorities holding the 1940 amendment to be constitutional.

While the constitutionality of the 1940 amendment has never been ruled upon by the Supreme Court of the United States, that Court did, on the 29th day of March, 1948, grant certiorari in the *National Mutual Insurance Co.* case and hearing has been had thereon in the October, 1948 term (Su-

preme Court, October, 1947 term No. 640, now October, 1948 term No. 29). That case, at this writing, is under advisement.

Article III, Section 2 of the Constitution has never been construed by the United States Supreme Court insofar as the question of diversity of citizenship between a citizen of a state and a citizen of a territory or of the District of Columbia is concerned. In fact, that Court has expressly declined to construe the meaning of the words "controversies between citizens of different states" as used in the constitution (Article III, Section 2) as distinguished from the Judiciary Act. (*Treinies v. Sunshine Mining Co.,* 308 U. S. 66, 71, 60, S. Ct. 44, 47; 84 L. Ed. 85, 89-90.)

The question of whether an action may be maintained in the Federal District Courts between a citizen of a state and a citizen of a territory, or of the District of Columbia first arose with regard to the right as to a citizen of the District of Columbia in the leading decision by Chief Justice Marshall in *Hepburn and Dundas v. Ellzey,* 2 Cr. 445, 6 U. S. 445; 2 L. Ed. 332, in which the great Chief Justice held that jurisdiction did not exist. It is to be noted, however, that in the *Hepburn* case Chief Justice Marshall did not mention Article III, Section 2 of the Constitution, nor attempt to construe it, stating only that the jurisdiction of the Court *"depends on the Act of Congress describing the jurisdiction of the Court."* In that case, Chief Justice Marshal stated:

> "It is true that as citizens of the United States and of that particular district which is subject to the jurisdiction of Congress, it is extraordinary that the Courts of the United States, which are open to aliens, and to the citizens of every state in the Union, should be closed to them. *But*

this is a subject for legislative and not for judicial consideration." (Italics supplied.)

The language of the above quotation, and particularly the emphasized portion thereof, clearly shows that while Congress had not, at that time, seen fit to extend the rule of diversity of citizenship to citizens of the District of Columbia, it had the power to do so unprohibited by the Constitution, that being a legislative function, and the language seems subject to no other logical interpretation.

Chief Justice Marshall, in the *Hepburn* case, attempted to construe only the language of the Judiciary Act of 1789 insofar as it related to diversity of citizenship and that he was construing that Act of Congress only, and not Article III, Section 2 of the Constitution is reiterated in his language in the later case of *New Orleans v. Winter,* 1 Wheat. 91, 94, 14 U. S. 91, 94, where he stated, in holding that a citizen of a territory could not sue a citizen of a state in the Federal Courts, as follows:

"Every reason assigned for the opinion of the Court, (*in Hepburn and Dundas v. Ellzey*) that a citizen of Columbia was not capable of suing in the courts of the United States *under the Judiciary Act,* is equally applicable to a citizen of a territory." (Italics supplied.)

Prior to the 1940 amendment to *Judicial Code, Section 24 (1),* a number of decisions have held that a citizen of a state could not sue a citizen of a territory or the District of Columbia in the Federal District Courts, but all of such decisions have been based upon the language and reasoning of *Hepburn and Dundas v. Ellzey,* and have construed only the language of the Judiciary Act and not the Constitution.

Typical is the language of Mr. Justice Miller, in *Barney v. Baltimore City,* 6 Wall. 280, 73 U. S. 280:

> "In the case of *Hepburn and Dundas v. Ellzey,* it was decided by this Court, speaking through Marshal, C. J. that a citizen of the District of Columbia was not a citizen of a State *within the meaning of the Judiciary Act,* and could not sue in a Federal Court." (Italics supplied.)

See also *Hooe v. Jamieson,* 166 U. S. 395, 17 S. Ct. 596, following the *Hepburn* case, and expressly construing only the Judiciary Act of 1789.

It is, therefore, plain that *Hepburn and Dundas v. Ellzey* and the decisions which have followed it may not be construed to interpret the language of the constitution, Article III, Section 2. As stated in *Cohens v. Virginia,* 6 Wheat. 264, 399:

> "It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they will be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

II

ARTICLE III, SECTION 2 OF THE CONSTITUTION CAN NOT BE CONSTRUED TO EXCLUDE FROM THE FEDERAL COURTS ACTIONS BETWEEN A CITIZEN OF A STATE AND A CITIZEN OF A TERRITORY.

All presumptions are in favor of the validity of this statute and it should not be declared unconstitutional unless the conflict with the Constitution is clear beyond a reasonable doubt. This principle of

law is fundamental and has been re-affirmed many times by the Supreme Court.

> "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity." *U. S. v. Del. & Hudson Co.,* 213 U. S. 366, 407, 53 L. Ed. 836, 849 (1909).
>
> *Brown v. State of Maryland,* 12 Wheat. 419, 25 U. S. 419, 436;
>
> *Alaska Packers Assn. v. Industrial Accident Commission of California,* 294 U. S. 532, 543; 51 S. Ct. 92, 75 L. Ed. 276.

An Act of Congress can be declared void only when it violates the Constitution clearly, palpably and plainly, in such manner as to leave no doubt or hesitation in the court's mind. The Appellee has the burden of meeting this strict requirement which has been firmly and unequivocally laid down by the courts through the years.

It is well established that the Constitution must be interpreted in the light of prior and contemporaneous history and of the conditions and circumstances under which the Constitution was framed. The Court must look to the mischief intended to be remedied and to the remedy intended to be provided, fitting the intention of the framers of the Constitution to conditions as they exist today. Thus, Chief Justice Marshall in *Gibbons vs. Ogden,* 9 Wheat. (U.S.) 1, 6 L. Ed. 23, said:

> "This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought

> they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? . . . . . As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case . . . . . We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred."

and Mr. Justice Story, *Prigg vs. Commonwealth of Pennsylvania,* 16 Pet. (U. S.) 539, 10 L. Ed. 1060, stated with reference to interpretations of the Constitution:

> "It will, indeed, probably be found, when we look to the character of the Constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures as well as the known historical fact that many of its provisions were matters of compromise of opposing interests and opinions, that no uniform rule of interpretation can be applied to it, which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses. And, perhaps, the safest rule of interpretation after all will be found to be to look to

> the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed."

Mr. Justice Peckham, further stated the rule in *Maxwell vs. Dow,* 176 U. S. 581, 20 S. Ct. 448, 44 L. Ed. 597 as follows:

> "The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein, any doubtful expression in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted."

See also Cooley, C. J., *People v. Harding,* 53 Mich. 481, 485; 18 N. W. 555, 19 N. W. 155.

The fact that the word "states" as contained in the Judiciary Act of 1789 has been construed to mean only the states of the American confederation as distinguished from territories and the District of Columbia, in no way requires that such a construction be given the word as it appears in Article III, Section 2, of the Constitution.

It is well established that identical language in the Constitution and in a statute may be given different interpretations in the Constitution than in the statute. *Lamar v. U. S.,* 240 U. S. 60, 65; 36 Supreme Court 255, 257. The rule is well stated by Professor Chaffee of Harvard Law School in an article "Federal Interpleader Since the Act of 1936", 49 Yale Law Journal 377, 395, as follows:

> "Constitutional language may properly be given a wider interpretation than statutory lan-

guage. Since the Constitution has broader purpose than a statute, and is intended to last for a much longer time, its wording should possess a flexibility which is not needed in a statute."

Looking to the evil which the framers of the Constitution attempted to remedy by enacting Article III, Section 2, it is apparent that the purpose intended requires that the word "states" as therein contained should be interpreted to include the territories and the District of Columbia, and that Congress was intended to have vast powers of organization over the judiciary.

Alexander Hamilton in *"The Federalist"* No. LXXX, clearly expressed this view when he analyzed the judicial branch of the National Government. In his discussion of Article III of the Constitution he said:

> "From this review of the particular powers of the federal judiciary, as marked out in the constitution, it appears that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. If some partial inconveniences should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected that the national legislature will have ample authority to make such *exceptions,* and to prescribe such regulations, as will be calculated to obviate or remove these inconveniences. The possibility of particular mischiefs can never be viewed, by a well-informed mind, as a solid objection to a principle, which is calculated to avoid general mischiefs, and to obtain general advantages." (Italics in original.)

This thought is reiterated by Mr. Justice Chase in a note to *Turner v. Bank of America,* 4 Dall. 810 (1799) as follows:

> "The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this court, we possess it, not otherwise; and if Congress has not given the power to us, or to any other court, it still remains at the legislative disposal".

The federal courts were given jurisdiction in diversity of citizenship cases to insure fair disposition of suits brought by citizens of one state in the courts of another state. (2 *Curtis History of Constitution of the United States,* 441-444.) The intentions of the framers of the Constitution and the contemporary attitude as to Article III, Section 2, are well expressed by James Madison:

> "As to its cognizance of disputes between citizens of different states, I will not say it is a matter of such importance. Perhaps it might be left to the state courts. But I sincerely believe this provision will be rather salutary, than otherwise. It may happen that a strong prejudice may arise in some states, against the citizens of others, who may have claims against them. We know what tardy, and even defective administration of justice, has happened in some states. A citizen of another state might not chance to get justice in a state court, and at all events he might think himself injured." *5 Writings of James Madison, 219.*

The well expressed purposes of the framers of the Constitution in enacting Article III, Section 2, to insure that the citizens of every state would find open to them in another jurisdiction a tribunal unbiased by local consideration and without favoritism toward local citizens, applies with equal force to citizens of

the territories and of the District of Columbia. It is inconceivable that those men who enacted the Constitution intended to grant this safeguard to one group of citizens of the United States, while denying it to another group of citizens. Chief Justice Marshall was in complete accord with this view when he said of the citizens of the District of Columbia in *Hepburn and Dundas v. Ellzey* (supra):

> "It is extraordinary that the courts of the United States which are open to aliens and to citizens of every State in the Union, should be closed to them."

and it is only right that he should have, by inference, directed the Congress to rectify the omissions of the Judiciary Act of 1789 by stating:

> "But this is a subject for Legislative and not for Judicial consideration."

There is no reason whatever why the word *"states"* as contained in Article III, Section 2, of the Constitution, and never heretofore construed by the Supreme Court, should not be interpreted to include the territories and the District of Columbia, and the purpose of that section, as above stated by Madison, would seem to require such an interpretation. That word has been construed many times by the courts, sometimes to include the territories and the District and sometimes to exclude them. As stated in 29 *Georgetown Law Journal* 193, 198, referring to interpretations of the word as used in the Constitution:

> "If a numerical recapitulation were made of the instances in which the word 'states' has been considered as including the District of Columbia, and the territories, and in the instances in which it has not, undoubtedly the former would be the larger of the totals. It is not suggested that a numerical superiority should be the con-

trolling factor in a determination of this matter. However, it is indicative that the Supreme Court has not been concerned with consistency in interpreting this phase of the Constitution."

Because the sections of the Constitution applicable thereto refer only to "states" and do not mention territories, or the District of Columbia, who would logically contend that the Territory of Hawaii may, for example, enter into a treaty, alliance or confederation, coin money, pass bills of attainder and ex post facto laws, grant titles of nobility, lay imposts or duties on imports or exports, keep its own troops or ships of war, enter into agreements or compacts with foreign powers, or engage in war (Article I, Section 10) or that the Territory may assume or pay a debt or obligation incurred in aid of insurrection, or rebellion against the United States, or a claim for the loss or emancipation of a slave (Amendments, Article XIV, Section 4), or deny to a citizen of the United States the right to vote by reason of race, color or previous condition of servitude, (Amendments, Article XV, Section 1), or by reason of sex (Amendments, Article XIX, Section 1), or that Congress must apportion income taxes collected from within the territories or the District of Columbia (Amendments, Article XVI). Numerous other instances exist within the Constitution where a narrow interpretation of the word "states" would have an equally ridiculous result.

The words "shall extend to" contained in Article III, Section 2, of the Constitution, are not words of limitation as to the judicial power of the United States, but are plainly words of grant guaranteeing to the people that they shall have that much protection under the judicial power which can not be denied

them by Congress, and Congress has the power to grant the people protection under the judicial power in excess of that expressly stated in Article III, Section 2. The words "shall extend to" as used, do not prohibit Congress from extending the benefits of the judicial power of the United States to citizens other than those expressly enumerated in Article III, Section 2. *Winkler v. Daniels,* 43 F. Supp. 265; 39 Words and Phrases 135; 39 Words and Phrases, Pocket part, page 26. As stated in 21 Tulane Law Review 177, referring to Chief Justice Marshall's statement that "this is a subject for Legislative consideration" the authors say:

> "The statement can have but one meaning; Marshall felt that the constitution allowed the revision of the diversity clause either under a broad interpretation of Article III, or by authority of some other constitutional provision."

and see also 11 George Washington Law Review 258:

> "Chief Justice Marshall made it plain that the scope of the Court's jurisdiction was within the power of Congress to determine, and the Act as it then read did not embrace the District of Columbia as a 'State'. Thus, it can be seen that this decision, to which all subsequent courts have alluded in deciding the same question, *by no means closed the door to Legislative extension* . . . . ." (Italics supplied.)

As one of the framers of the Constitution, James Madison stated, *supra,* it was the intention that Article III, Section 2, should prevent local discrimination which it now appears is as applicable to the territories as to the States of the Union, and as Alexander Hamilton stated, *supra,* it was intended that the Congress should have great latitude in preventing excep-

tions and inconveniences and prescribing regulations to obviate and remove these inconveniences.

III

THE POWER OF THE CONGRESS TO EXTEND THE JURISDICTION OF THE FEDERAL COURTS TO ACTIONS BETWEEN CITIZENS OF A STATE AND CITIZENS OF A TERRITORY IS NOT DERIVED SOLELY FROM ARTICLE III, SECTION 2, OF THE CONSTITUTION BUT MAY BE FOUND ELSEWHERE IN THAT INSTRUMENT.

The power of Congress to prescribe the jurisdiction of the Courts of the United States is not derived alone from Article III, Section 2 of the Constitution and not limited thereby, such power having been granted to Congress under a number of other Articles of the Constitution. *Winkler v. Daniels,* 43 F. Supp. 265; *Duze v. Woolley,* 72 F. Supp. 422; *O'Donoghue v. United States,* 289 U. S. 516.

Thus, the preamble of the Constitution itself states the purpose of that instrument to be, among other things, "to establish justice and promote the general welfare and secure the blessings of liberty to ourselves and our posterity . . . ." Likewise, Article I, Section 2, Clause 1, gives Congress the power to ". . . . provide for . . . . the general welfare of the United States," and Article I, Section 8, Clause 9, gives Congress the power "to constitute tribunals inferior to the Supreme Court" and Article I, Section 8, Clause 18, gives Congress the power "to make all laws which shall be necessary and proper to carry into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department or officer

thereof". The foregoing references to the Constitution of the United States show the granting of power to Congress to establish courts and a judicial system and, as a necessary incident thereof, the power to prescribe the jurisdiction of such courts.

It has been said that the "due process" clause of the 5th Amendment accords to citizens of the United States who are not citizens of a state that protection which is accorded to citizens of a state by the "equal protection of the laws" clause of the 14th Amendment. Thus, a denial by Congress of the right of one group of citizens to redress in the Courts of the United States, where that right is given to another groups of citizens, would certainly seem violative of the "due process" clause of the 5th Amendment.

It would likewise seem futile to argue that any segment of the citizenry of the United States should be denied the privileges and immunities guaranteed under Article IV, Section 2, Clause 1, of the Constitution.

Article IV, Section 3, Clause 2, of the Constitution reads as follows:

> "The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States or of any particular state."

This would seem beyond any question to authorize the Congress to prescribe the judicial system to exist in any territory and the jurisdiction of the courts therein, and also to prescribe the rights of the citizen of such a territory to the use of the courts of the

United States, and the rights of any other citizen of the United States with respect to the use of the courts of the United States in actions by or against a citizen of such territory. The above quoted section of the Constitution must be very liberally construed for it is the principal source of the rights of Congress with respect to the territories. It would appear that the Amendment of April 20, 1940, to Judicial Code, Section 24 (1) is fully justified under the powers extended to Congress under the foregoing section of the Constitution. The section of the Constitution last quoted is analogous to Article I, Section 8, Clause 17, of the Constitution which has been held to justify the Amendment of April 20, 1940, as to the diversity of citizenship with regard to citizens of the District of Columbia *(Winkler v. Daniels, supra).* In fact, it has been stated that Article IV, Section 3, Clause 2, grants greater power to Congress with regard to the Territory of Hawaii than does Article I, Section 9, Clause 17, with regard to the District of Columbia (*Dykes and Keeffee, the 1940 Amendment to the Diversity of Citizenship Clause,* 21 Tulane Law Review 171, 175).

An examination of the historical background with regard to the relationship of the Government of the United States with the Republic of Hawaii and the Territory of Hawaii further justifies the Amendment of April 20, 1940, heretofore referred to. Prior to 1898, the Government of the Republic of Hawaii offered to the Government of the United States a treaty providing for the ceding of the Republic of Hawaii to the United States and its annexation to the United States. While it does not appear with certainty that the treaty referred to was actually entered into by the Government of the United States, the

offer therein made by the Government of the Republic of Hawaii was formally accepted by the Government of the United States by a Joint Resolution of Congress approved July 7, 1898, and set forth in *30 U. S. Stats. at Large, Pages 750-751,* which contains the provisions for the judicial power of the Territory until Congress made further provisions.

By the Act of April 30, 1900, commonly referred to as the Hawaiian Organic Act which is set forth in *31 U. S. Stats. at Large, Pages 141-162,* Congress did prescribe a complete form of government for the Territory of Hawaii, declaring all citizens of the Republic of Hawaii to be citizens of the United States (Section 4) and that the Constitution of the United States and all laws of the United States which were not locally inapplicable should have the same force and effect within the Territory of Hawaii as elsewhere in the United States (Section 5). Section 86 of the Organic Act established a United States District Court within the Territory of Hawaii and provided that said Court should have the ordinary jurisdiction of District Courts in the United States and Circuit Courts and that the Judge, District Attorney, and Marshal of said Court should have, within the Territory of Hawaii, all the powers conferred by the Laws of the United States upon the Judges, District Attorneys, and Marshals of the District and Circuit Courts of the United States. Section 86 further prescribes the same extent and procedure of appeal to the Appellate Courts of the United States as are allowed the corresponding courts within the states and the same procedure as to other matters and proceedings as between courts of the United States and the courts of the several states was declared to exist between the courts of the United States and the

courts of the Territory of Hawaii. Such actions by Congress in accepting the offer contained in the treaty submitted by the Republic of Hawaii and relied upon by the citizens of that Republic, would appear to have virtually the status of a treaty under the treaty power granted by the Constitution.

All of the foregoing must be construed in the light of the 9th Amendment to the Constitution of the United States which provides as follows:

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the People."

The entire subject of the constitutionality of the April 20, 1940, Amendment to Judicial Code, Section 24 (1); 28 U. S. C. A., Section 41, Subd. (1), is excellently and completely discussed by John A. Dykes and Arthur J. Keeffe, Professor of Cornell University Law School in an article *"The 1940 Amendment to the Diversity of Citizenship Clause,"* 21 Tulane Law Review, 171 (December, 1946), cited with approval in *Duze v. Woolley,* 72 F. Supp. 422, which treats all of the conditions pro and con, as to such constitutionality and resolves all of them in favor of constitutionality, supporting such holdings with adequate authority. See also 5 Louisiana Law Review, 478, 55 Yale Law Journal 600, 11 George Washington Law Review 258, 21 Texas Law Review 83, 21 Tulane Law Review 171, XLV Columbia Law Review 125, 29 Georgetown Law Journal 193.

See also *House of Representatives, 76th Congress, 3rd Session report No. 1756* covering the 1940 Amendment to Judicial Code, Section 24 (1).

CONCLUSION

For the foregoing reasons it is submitted:

1. That the true purpose of the diversity of citizenship clause, Article III, Section 2, requires its application to citizens of the territories and the District of Columbia.

2. That the Territory of Hawaii is a "state" within the meaning of Article III, Section 2.

3. That Congress, in the exercise of its power to legislate for the welfare of the citizens of the Territory of Hawaii, under Article IV, Section 3, Clause 2, properly permitted actions to be maintained by or against citizens of the Territory of Hawaii in all Federal Courts.

4. The changing requirements of our modern civilization necessitate a lenient interpretation of the Constitutional provisions with which we are here concerned directed toward the maintenance of justice for all of our nation's citizens, and the framers of the Constitution so intended. To withhold from the citizens of the territories and of the District of Columbia the right to sue in our Federal Courts, where diversity of citizenship exists, creates an illogical situation that Congress has properly moved to correct.

It is therefore earnestly urged that the District Court erred in dismissing the Appellant's complaint as to the Appellees, and that the Court's order should be reversed.

Respectfully submitted,

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